TABLE OF CONTENTS

	Page
The Opinions Below	2
Questions Presented By The Petitioners	2
Reasons For Denying The Applications	3
Conclusion	5

CASES CITED:

Bedding, Curtain and Drapery Workers Union v. NLRB, 390 F. 2d 495, 499 (CA 2) and Painters Union (J.M. Miller Decorating Co.), 156 NRLB No. 32	3
C.R., NLRB v. J. H. Rutter-Rex Mfg. Co., United States Supreme Court, decided December 15, 1929	4
Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474	3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM 1969

Nos. 500 AND 557

NATIONAL LABOR RELATIONS BOARD
and BURNS AND ROE, INC., and
WHITE CONSTRUCTION COMPANY,

Petitioners,

vs.

LOCAL 825 INTERNATIONAL UNION OF
OPERATING ENGINEERS AFL-CIO,

Respondent.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice of the United States Supreme Court and the Associate Justices of the United States Supreme Court:

Respondent prays that the Petitions for Writs of Certiorari to review the Judgment of the United States Court of Appeals for the Third Circuit entered in the above case on May 29, 1969 be denied.

The Opinions Below

The National Labor Relations Board Trial Examiner's decision issued September 28, 1966. The National Labor Relations Board's decision and order was made on February 13, 1967 and is reported at 162 NLRB 1617. The Court of Appeals filed its Judgment May 29, 1969. The opinion is reported at 410 F. 2d 5. (See Appendices A, B and C of Petitioner Burns & Roe, Inc.'s Brief).

Questions Presented By The Petitioners

The Petitioner National Labor Relations Board sets forth as its questions presented the following:

Whether a union violates Section 8 (b) (4) (B) of the National Labor Relations Act by exerting coercive pressure upon a neutral employer, that compels such employer either (1) to induce the primary employer to change his method of doing business or (2) to cease doing business entirely with the primary employer.

The Petitioner Burns and Roe Inc. and White Construction Co. contend that the question presented is whether to prove a violation of the secondary boycott provisions of the National Labor Relations Act, it is necessary to establish that a union's object is to bring about a total cessation of business between the neutral and primary employer.

It is respectfully submitted that the questions presented by both petitioners do not accurately reflect the holding of the Court of Appeals for the Third Circuit. The questions presented by the Petitioner, National Labor Relations Board do not appear, it is submitted, in the holding of the Court. Likewise, the question submitted by the other Petitioner does not appear in the holding of the Court. In addition both Petitioners contend that questions of law are

involved in the holding of the Court and that complex questions of interpretation and construction result from said holding. The Respondent does not agree.

Reasons For Denying The Applications

It is submitted that the Court of Appeals for the Third made no more than a finding of fact that the evidence was insufficient to establish that an object of the union's conduct was to force or require any employer to cease doing business with any other employer in this regard. The Court held that the evidence before it ". . . compelled the inference that the Union wanted the contractor to use its influence with the sub contractor to change the sub contractor's conduct, not to terminate their relationship" 410 F. 2d at Page 10.

Accordingly, the sole question presented by the holding of the Court is whether on the factual record before it did the Union violate the secondary boycott provisions of the National Labor Relations Act? The court, although not specifically in effect, applied the standards of *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474, and held that the record did not contain substantial evidence to establish an illegal objective and therefore, refused to enforce the order of the NLRB.

The question of illegal objective under Section 8 (b) (4) (B) of the National Labor Relations Act is one of fact and not law, and both the NLRB and the Courts of Appeals have treated this issue as being factual in nature. See *Bedding, Curtain and Drapery Workers Union v. NLRB,* 390 F. 2d 495, 499 (CA 2) and *Painters Union (J.M. Miller Decorating Co.),* 156 NRLB No. 32.

In the latter case, a union made a threat to a general contractor that if the dispute with a subcontractor was not resolved, the Union would picket the job site. The Board

held that the threat was made to elicit the contractor's aid in its dispute with the subcontractor and that under the circumstances of the case, the reasonable inference was that the union was seeking to have the contractor influence the subcontractor to have the latter comply with the Union's demands. In this connection, the Board stated that one of the circumstances it considered was the fact that the union did not request the contractor to cease doing business with the subcontractor. The facts in the instant case as held by the Court below warranted a similar inference.

While both petitioners frame the issues as questions of law, casting the issues as one of law rather than as one of fact, does not conceal the true nature of the holding below. C.R., *NLRB v. J. H. Rutter-Rex Mfg. Co.*, United States Supreme Court, decided December 15, 1929. (Dissenting opinion of the Chief Justice, Mr. Justice Douglas and Mr. Justice Harlan).

As a result of the foregoing it is further submitted that no substantial question of law exists, no unique construction or interpretation of a statute exists, and in view of the factual nature of the holding, no conflict of decisions of Courts of Appeals exists.

The role of this Court upon review is set forth in the *Universal Camera Case* cited above. The Court in that case held:

> ". . . Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied. . . ."

CONCLUSION

For the reasons herein above it is respectfully submitted that the Petitions for Writ of Certioriari should be denied.

Respectfully submitted,

THOMAS E. DURKIN, JR.
Attorney for Respondent

By: Earl S. Aronson /s/
EARL S. ARONSON